APPENDIX A

United States Constitution, Art. IV, § 3, cl. 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State.

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

39 Stat. 535, as amended, 16 U.S.C. § 1:

> There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

39 Stat. 535, as amended, 16 U.S.C. § 2:

> The director shall, under the direction of the Secretary of the Interior, have the supervision, man-

agement, and control of the several national parks and national monuments which on August 25, 1916, were under the jurisdiction of the Department of the Interior, and of the Hot Springs National Park in the State of Arkansas, and of such other national parks and reservations of like character as may be created by Congress. In the supervision, management, and control of national monuments contiguous to national forests the Secretary of Agriculture may cooperate with said National Park Service to such extent as may be requested by the Secretary of the Interior.

39 Stat. 535, as amended, 16 U.S.C. § 3:

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2, 4 22, and 43 of this title shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months or both, and be adjudged to pay all costs of the proceedings. He may also, upon terms and conditions to be fixed by him, sell or dispose of timber in those cases where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any such park, monument, or reservation. He may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations. He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations provided for under section 2 of this title, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented,

or granted to any one on such terms as to interfere with free access to them by the public: *Provided, however,* That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze livestock within any national park, monument, or reservation referred to in this section and sections 1, 2, 4, 22, and 43 of this title when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park: *And provided further,* That the Secretary of the Interior may grant said privileges, leases, and permits and enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids: *And provided further,* That no contract, lease, permit, or privilege granted shall be assigned or transferred by such grantees, permittees, or licensees without the approval of the Secretary of the Interior first obtained in writing: *And provided further,* That the Secretary may, in his discretion, authorize such grantees, permittees, or licensees to execute mortgages and issue bonds, shares of stock, and other evidence of interest in or indebtedness upon their rights, properties, and franchises, for the purposes of installing, enlarging, or improving plant and equipment and extending facilities for the accommodation of the public within such national parks and monuments.

39 Stat. 535, 16 U.S.C. § 4:

The provisions of sections 1, 2, 3, 22, and 43 of this title shall not affect or modify the provisions of sections 79 and 522 of this title, and section 959 of Title 43.

New Mexico Statutes Annotated (Repl. 1962), § 53-2-7:

Unless and except as permitted by regulations made as in this act provided, or as otherwise allowed by law, it shall be unlawful:

(a) To hunt, take, capture, kill, or to attempt to take, capture, or kill, at any time or in any manner, any game animal, game bird, or game fish in the state of New Mexico.

(b) To possess, offer for sale, sell, offer to purchase or purchase, in the state of New Mexico, all or any part of any game animal, game bird, or game fish, taken, captured or killed in said state.

Violation of any of the provisions of this section shall constitute a misdemeanor, and any person convicted of violating any of the provisions hereof shall be punished as provided in section 7 [53-2-9] of this act.

New Mexico Statutes Annotated (Repl. 1962), § 53-3-23:

The state director may issue permits to any person to take, capture, kill, transport within or out of the state any game, birds or fish mentioned in this chapter at any time when satisfied that such person desires the same exclusively as specimens or for scientific or propagating purposes. Such permit shall be in writing and shall state the kind and number to be taken and the manner of taking, the name of the person to whom issued, the name of the place to which the same is to be transported and the name of the persons shipping such game, birds or fish, and shall be signed by him. Such permit shall not be transferable nor shall it be lawful to sell or barter any of the animals, birds or fish taken or exported under such permit for food purposes, and the holder of such permit shall be liable to the penalties provided in this chapter if he violates any of its provisions.

New Mexico Statutes Annotated (Repl. 1962), § 53-3-25:

The state game and fish warden may grant permits to owners or lessees of land for the capture or destruction on their lands of any protected game doing damage to their cultivated crops or property;

Provided, that on said permit or permits so issued as aforesaid, the state game and fish warden shall fix the numerical limit of any protected game so to be captured or destroyed and shall also therein fix the time limit within which any such protected game shall be so captured.

The state game and fish warden shall also grant permits, preferably to owners or lessees of land, for the capture of such beaver as interfere with the operation of any lawful canal, ditch or dam, or cause or threaten the destruction of private property and for the capture of beaver to be transferred from one stream to another, Provided, however, that all skins of beaver taken under the provisions of this section shall be turned into the state game and fish warden, to be by him sold and one-half of the proceeds therefor to be by said state game and fish warden conveyed into the game protection fund and the other one-half of the proceeds to be by said state game and fish warden turned over to the holder of said permit.

APPENDIX B

The NEW MEXICO STATE GAME COMMISSION, Plaintiff,

v.

Stewart L. UDALL, Secretary of the Interior, Stanley A. Cain, Assistant Secretary of the Interior, George Hartzog, Jr., Director of National Park Service, Neal G. Guse, Superintendent of Carlsbad Caverns National Park, R. R. Mabery, Chief Ranger, and Robert J. Schumerth, Neal R. Bullington, William J. Wilson, Robert M. Turner, Walter B. O'Neal, Walter H. Kittam, Derrick C. Cooke, Park Rangers, Defendants.

Civ. A. No. 7373.

United States District Court
D. New Mexico.
March 13, 1968.

Opinion

PAYNE, Chief Judge.

This is a contest between the New Mexico State Game Commission and the Secretary of the Interior and his delegates. Ostensibly, the issue presented concerns the Secretary's authority to order the destruction of wildlife in the Carlsbad Caverns National Park, in violation of New Mexico law, for the purpose of conducting a scientific research study. The broader issue presented relates to the role of the States in the activity of wildlife management. Because federal lands located in states other than New Mexico might be affected by the outcome of this dispute, a number of states have appeared as *amicus curiae*.

Plaintiff has requested (1) a declaratory judgment pursuant to 28 U.S.C. § 2201, and (2) that the defendants be enjoined from killing any more wildlife in the park. Defendants contend that they are acting within their authority and that this is in reality a suit, without consent, against the United States. They have responded with a motion for summary judgment.

The parties have filed herein a stipulation of the facts, and the case is being decided on its merits and not on the defendants' motion for summary judgment. Both parties desire that the Court decide the case on the stipulation as though a trial had been held.

When the parties signed and filed the stipulation of facts, the Court inquired whether the deer in question were to be killed to prevent injury to the park lands, or to permit a study to determine the likelihood of future depredation. The Court was informed that the Government did not intend to kill the deer because of present knowledge of depredation, but merely to gather information as the basis for a study. It has been stipulated that the State of New Mexico has offered to provide the defendants with state permits authorizing the killing of the deer, and that the defendants have refused the offer.

As mentioned, defendants contend this is, in reality, an unconsented-to suit against the United States. In this regard, the Court is cognizant of the rule that an officer of the United States, such as the Secretary of the Interior, is immune to suit in his official capacity when the suit is, in effect, one against the United States. However, there exists an exception to the rule where there are allegations that the officer's actions exceeded his statutory authority. Actions of an official that exceed his authority are not actions of the United States, and in such case, the doctrine of sovereign immunity does not apply. Malone v. Bow-

doin, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168; Pan American Petroleum Corp. v. Pierson, 284 F.2d 649 (10 Cir., 1960); Frost v. Garrison, 201 F.Supp. 389 (D.Wyo. 1962). In the instant case, plaintiff alleges that defendants are without authority to do the acts complained of, and the Court concludes that the doctrine of sovereign immunity does not preclude this action.

In the alternative to the contention that the defendants have exceeded their authority, plaintiff alleges that any such authority found to exist is clearly unconstitutional. Should it be determined that defendants were acting within their statutory authority, and that a substantial question of constitutionality with respect to the statute, or statutes, challenged exists, the Court would initiate the convening of a three-judge panel to hear the matter. Ex parte Poresky, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152, and cases following. However, insofar as the problem is one of statutory construction, and the constitutional question is not reached, the parties and the Court are in agreement that the case is not one appropriate for adjudication by a three-judge court.

The parties are apparently in agreement that the United States has not acquired exclusive jurisdiction over the Carlsbad Caverns National Park. If the Federal Government possessed exclusive jurisdiction over this area, a different problem would be presented. See, for example Chalk v. United States, 114 F.2d 207 (4 Cir., 1940), cert. denied, 312 U.S. 679, 61 S.Ct. 449, 85 L.Ed. 1118. No evidence to the contrary having been introduced, the Court concludes that the land in question was not acquired under circumstances which authorize the United States to exercise exclusive jurisdiction, and that New Mexico has not ceded exclusive jurisdiction over the area to the Federal Government. From this conclusion, it follows that the au-

thority of the Federal Government upon the Carlsbad National Park is not absolute. The question then remains whether Congress has provided the Secretary with the authority that he now asserts. If the asserted authority exists, State Law that is inconsistent therewith must fall.

According to the law of the State of New Mexico, the State Game Commission is charged with the responsibility of managing, controlling, and of regulating the hunting of all resident species of wildlife within the state. The defendants are charged by federal law with the responsibility of managing and controlling federal lands in the state, including the area known as Carlsbad Caverns National Park.

In accordance with a program planned by the National Park Service, the defendants notified the New Mexico State Game Commission that they intended to issue federal permits to persons selected by them authorizing the killing of fifty deer in the Carlsbad Caverns National Park. The killing would take place out of the New Mexico deer hunting season, and the consent and cooperation of the Game Commission would not be obtained. Thereafter, certain of the defendants were issued such permits by another of the defendants, and fifteen deer were killed. Pending a determination of their right to continue, defendants have temporarily abandoned the program.

The parties' stipulation includes facts already recited, and makes reference to an affidavit filed in this case by the Director of the National Park Service in describing the program which is underway on Carlsbad Caverns National Park. The Director states that the federal officers are conducting studies concerning the "Dry Season Food Habits of Deer" within the Carlsbad Caverns National Park, and he concludes that

> (T)hese research programs are absolutely necessary for proper management and administration of Carlsbad Caverns National Park in order to fulfill the responsibilities and obligations of the Secretary of the Interior and his delegated agents to conserve the scenery, natural and historic objects, and wildlife of the park and that this research project is required in order that reliable scientific information may be gathered and used as a basis for other decisions affecting the management and administration of the area for the purpose of preserving and protecting the park lands from injury or damage.

The responsibility of administering, protecting, and developing Carlsbad Caverns National Park is placed with the National Park Service, subject to the provisions of Title 16, Sections 1 and 2-4 of the United States Code. 16 U.S.C. § 407a. By the terms of Section 1 of Title 16, the National Park Service is obligated to implement the fundamental purpose of the national parks. This fundamental purpose is "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. The defendants assert they are conforming with this directive in conducting their present study. They rely for their authority, as well, upon Section 3 of Title 16, which authorizes the Secretary to "provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks * * *."

Section 3 of Title 16 is clearly inapplicable in the present situation. No showing has been made that the deer involved are detrimental to the use of the park, and indeed, defendants make no such claim. It is the opinion of the Court that the Secretary's authority under this section must be predicated upon such a finding.

The question remains whether the broad mandate contained in Section 1 includes the authority the defendants have asserted. The Court has concluded that this section does not include such authority. Reading Section 1 of Title 16 as broadly as defendants contend it should be read would render Section 3 unnecessary, as the authority to order the destruction of wildlife "as may be detrimental to the use" of national parks would be provided without the specific authorization found in Section 3. It seems to the Court an unreasonable conclusion that Congress authorized an activity in Section 3 that was already permitted by Section 1. The conclusion that Congress intended the Secretary's authority to be proscribed by the conditions set forth in Section 3 seems the more logical to the Court.

Defendants rely in part upon Hunt v. United States, 278 U.S. 96, 49 S.Ct. 38, 73 L.Ed. 200 (1928). It seems to the Court that the defendants' reliance is misplaced, however, for that decision is distinguishable from the present case in more than one respect. In *Hunt*, the Supreme Court permitted the destruction of deer on a national forest and game preserve by United States officials, noting (1) that the deer were in such excess numbers "that the forage is insufficient for their subsistence" and the deer "have greatly injured the lands in the reserves by overbrowsing upon and killing valuable young trees, shrubs, bushes and forage plants", and (2) observance with the game laws of the State "would have so restricted the number of deer to be killed as to render futile the attempt to protect the reserves." 278 U.S. 96, 99, 100, 49 S.Ct. 38. Neither of the recited factors is present in this case. No depredation is known to be occurring, and New Mexico has offered to cooperate with the Federal officers. Clearly, *Hunt* does not authorize the killing of deer for

the purpose of conducting a study. No one doubts the Government's authority to protect its lands, and it seems to the Court that *Hunt* merely reaffirms that proposition, as does Section 3 of Title 16, U.S.C.

Section 53-3-23 of the New Mexico Statutes provides in pertinent part as follows:

> The state director may issue permits to any person to * * * kill * * * game * * * at any time when satisfied that such person desires the same exclusively * * * for scientific * * * purposes.

The Court concludes that Sections 1 and 2-4 of Title 16, U.S.C., do not authorize the destruction of wildlife upon the park for the purposes outlined in the Director's affidavit. The Court further concludes that enforcement of Section 53-3-23, New Mexico Statutes Annotated, quoted above, will not interfere with the Secretary's task as defined in 16 U.S.C. § 1. For these reasons, defendants must comply with Section 53-3-23, N.M.S.A. if they intend to pursue this study further.

This Court has jurisdiction to enjoin acts of officials which are unsupported by statutory authority. Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210; Frost v. Garrison (D. Wyo. 1962) 201 F. Supp. 389; Harper v. Jones (10 Cir. 1952), 195 F.2d 705, and cases cited therein. Accordingly, it is the opinion of the Court that the defendants should be restrained and enjoined from the further killing of wildlife within the boundaries of Carlsbad Caverns National Park for the purpose of conducting a research study, unless they first secure authority for their acts by compliance with State Law.

This opinion shall constitute the Court's findings of fact and conclusions of law, as required by Rule 52(a) of the Federal Rules of Civil Procedure.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM — 1969

THE NEW MEXICO STATE GAME COMMISSION,
Plaintiff-Appellee,
v.
STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.,
Defendants-Appellants.

No. 58-68

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

(No. 7373 Civil)

(Filed May 15, 1969)

Before PICKETT, LEWIS and HILL, Circuit Judges

PICKETT, Circuit Judge

The New Mexico State Game Commission brought this action seeking a judgment declaring that the Secretary of Interior and his subordinates did not have authority to kill deer within the boundaries of Carlsbad Caverns National Park in New Mexico for research purposes, without obtaining state permits required by New Mexico Statutes. The Commission also sought an injunction prohibiting further killing of deer without the state permit. The complaint alleged that under the law of New Mexico the Commission controls, regulates and manages the hunting of deer and other wildlife on all lands within the State of New Mexico; that the defendants were charged by federal law with the responsibility of managing and controlling lands in New Mexico known as "Carlsbad Caverns National Park"; that

the Commission was advised by the Park Superintendent that a "Deer Range Ecology Study" was to be undertaken which required the killing of not more than 50 deer within the park boundaries;[1] that some deer had been killed in violation of state law and the "announced scheme of killing fifty (50) deer" would be continued unless restrained. Attached to the complaint as exhibits was correspondence between the Park Superintendent and the Commission's Chief of Game Management.

Prior to the commencement of the action, a representative of the Commission was furnished with a statement of the objectives of the study and procedures to be followed. The value of the study to the State's overall management of one of its deer herds was acknowledged. Objection to the program arose only when the park officials refused to apply for state permits which had been offered. The trial court denied a motion to dismiss, holding that the action was not an unconsented suit against the United States. The case was disposed of on stipulated facts without a trial, and the court concluded that the aforesaid deer-killing program was not within the statutory authority of the Secretary of Interior or his subordinates, and enjoined further killing of the deer without a state permit. 281 F.Supp. 627. The district court recognized the "Government's authority to protect its lands" within the park boundaries, but held that the deer-killing program could be undertaken

1. The method of obtaining the deer desired for the study was described in a letter from the Park Superintendent to an appropriate representative of the Commission, as follows:

> "In connection with an in-depth research project entitled 'Deer-Range Ecology Study' the collection of deer paunches has been authorized. Research Biologist Walter H. Kittams and his assistant will be examining paunches and determining condition of deer obtained within the boundaries of the park by members of our uniformed staff. It is also possible that paunches from hunter-killed deer near the park boundary will be utilized if conditions warrant. At the present time we are stipulating that no more than 50 deer will be taken in the park in a 2-year period."

only after a showing or a finding that there was existing depredation caused by the deer. We are of the opinion that this narrow construction of the statute is unwarranted and hold that the research program to obtain reliable scientific information necessary to conserve the scenery and wildlife in the park was within the Secretary's statutory authority, and hence the case is an unconsented suit against the United States.

There is no dispute between the parties as to the general applicable law. As we stated in Harper v. Jones, 195 F.2d 705, *cert. denied*, 344 U.S. 821:

> "(W)here a federal officer acts within the limits of his legal power and authority and exercises a function legally delegated to him, an action to restrain him cannot be maintained without impleading the sovereign even though there is a claim of error in the exercise of that power or an abuse of discretion."

See also Larson v. Domestic and Foreign Corp., 337 U.S. 682; Ogden River Water Users Ass'n. v. Weber Basin Water Conservancy, 10 Cir., 238 F.2d 936; New Mexico v. Backer, 10 Cir., 199 F.2d 426; Frost v. Garrison, D.C. Wyo., 201 F.Supp. 389. These decisions, as well as a myriad of others, recognize that if a federal officer or employee acts beyond the power conferred upon him by Congress, the Immunity Rule has no application. The Court in *Larson* quoted with approval this language from Philadelphia Co. v. Stimson, 223 U.S. 605, 620:

> "(I)n case of injury threatened by his illegal action, the officer cannot claim immunity from injunctive process. The principle has frequently been applied to state officers seeking to enforce unconstitutional enactments. (Citing cases). And it is equally applicable to a Federal officer acting in excess of his authority or under authority not validly conferred." 337 U.S. 690-1.

The basic question, then, as presented here, is whether the supervisory powers granted to the Secretary of Interior over the management of national parks authorize the killing of deer within Carlsbad Caverns National Park for an ecology study to determine deer range conditions within that park.

The Secretary does not assert that the United States has any ownership in wild animals within the various states. Court decisions indicate that, insofar as wild animals within a state are capable of ownership, they are owned by the state in its sovereign capacity for the benefit of its people, with the resulting right to regulate the taking thereof. See Lacoste v. Dept. of Conservation, 263 U.S. 545; Geer v. Connecticut, 161 U.S. 519; 3 C.J.S., Animals, §§ 4 and 5 where the decisions are collected. It is conceded that the Secretary has the authority to destroy animals to protect national park property.

In Hunt v. United States, 278 U.S. 96, the power of the Secretary of Agriculture to direct the destruction of large numbers of deer when such action was necessary to protect the lands of the United States from serious injury was upheld under a statutory provision authorizing the Secre-

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2. The conditions which determined the necessity of the study were stated in a recommendation of a department biologist, which states:

> "Mule deer occur throughout the park and are the major consumers of browse, but the park lacks adequate data for a deer management plan. Deer have caused deterioration of choice browse plants on most of the park. Their effect on other vegetation, which likely comprises the bulk of the deer diet on most range sites, is unknown. Major fluctuations in deer numbers have apparently occurred over the years, but their relation to available forage and other factors has never been documented. Predation and nearby hunter harvest probably exert only minor control, and deer numbers build to the limit of the forage resource. To avoid serious deterioration of habitat, and damage to associated wildlife, the park must have basic information on deer-range relationships, and a system for routinely determining trend of the deer population and habitat."

tary of Interior to "make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which have been set aside or which may be hereafter set aside. . . ." 30 Stat. 31, 35.[3] Referring to the action taken by the Secretary, the Court said:

> "The direction given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress. And the power of the United States to thus protect its lands and property does not admit of doubt, (citing cases), the game laws or any other statute of the state notwithstanding." Hunt v. United States, *supra*, at 100.

The State Commission and the amicus curiae, accepting the conclusion of the trial court,[4] here argue that the *Hunt* decision is limited to authorizing destruction of deer to prevent depredation on public lands known to be occurring. The essence of the argument is that the statute authorizes the killing of wild animals only upon a finding that there exists a present depredation of the park property by the animals to be killed. It is true that the statute herein referred to does not in so many words provide that animals within a park may be killed for research purposes,[5] but the act creating Carlsbad Caverns National Park provides that its "administration, protection and development . . .

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3. The foregoing power was later extended to the Secretary of Agriculture at 33 Stat. 628 (now 16 U.S.C. § 472). See United States v. Hunt, D.C. Ariz., 19 F.2d 634.

4. In the trial court's opinion it is stated:

> "Section 3 of Title 16 is clearly inapplicable in the present situation. No showing has been made that the deer involved are detrimental to the use of the park, and indeed, defendants make no such claim. It is the opinion of the Court that the Secretary's authority under this section must be predicated upon such a finding." 281 F.Supp. 627, at 629.

5. The statute under consideration in the *Hunt* case made no reference to the destruction of any wild animals on United States Forest lands.

shall be exercised under the direction of the Secretary of Interior by the National Park Service, subject to the provisions of sections 1 and 2-4 of this Title." 16 U.S.C. 407a. 16 U.S.C. § 1 creates the National Park Service and provides that it shall be under the charge of a director appointed by the Secretary of Interior. Clearly the Secretary has broad statutory authority to promote and regulate the national parks to conserve the scenery and wildlife therein "in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C § 1. Anything detrimental of this purpose is detrimental to the park. In addition to this broad authority, the Secretary is specifically authorized "in his discretion" to destroy such animals "as may be detrimental" to the use of any park. 16 U.S.C. § 3. The obvious purpose of this language is to require the Secretary to determine when it is necessary to destroy animals which, for any reason, *may be detrimental* to the use of the park. He need not wait until the damage through overbrowsing has taken its toll on the park plant life and deer herd before taking preventive action no less than he would be required to delay the destruction of a vicious animal until after an attack upon a person. In the management of the deer population within a national park the Secretary can make reasonable investigations and studies to ascertain the number which the area will support without detriment to the general use of the park. He may use reasonable methods to obtain the desired information to the end that damage to the park lands and the wildlife thereon may be averted.

The affidavit of the Director of the National Park Service describes the purpose of the research program and contains this statement:

> "That the Dry Season Food Habits of Deer and Deer-Range Relationship research programs which

are attached as Exhibits A and B contemplate the killing within the boundaries of Carlsbad Caverns National Park of approximately 50 deer by National Park Service employees. These research programs are absolutely necessary for the proper management and administration of Carlsbad Caverns National Park in order to fulfill the responsibilities and obligations of the Secretary of the Interior and his delegated agents to conserve the scenery, natural and historic objects, and wildlife of the park; and that this research project is required in order that reliable scientific information may be gathered and used as a basis for other decisions affecting the management and administration of the area for the purpose of preserving and protecting the park lands from injury or damage."

The Commission's Chief of Game Management acknowledged the value of the study to the State's overall management of the deer herd within the area. Under these conditions the Secretary has statutory power to proceed with the ecology study, which requires the killing of some deer within the park boundaries, without interference from state authorities. In protecting the park property it is immaterial that the United States does not have exclusive jurisdiction over the lands within Carlsbad Caverns National Park. Nor are there any constitutional barriers to the procedure. Hunt v. Arizona, *supra*. The relief sought is in effect against the United States.

The action was not the result of the program itself, but was caused by a fear that the deliberate refusal to apply for the deer-killing permits was in furtherance of a "scheme" of the federal authorities to eventually take over the control and management of the wildlife on all federal lands.[6]

6. Typical of this position is the statement in the brief of amicus curiae International Association of Game, Fish and Conservation Commissioners:

"The basic question before this Court is whether federal officers may kill deer on (sic) a national park, in violation

This concern is understandable, particularly in public land states where a large percentage of the lands is owned by the United States, and upon which, in some instances, most of the state's game is found. If this threat is real, so far as the statutory power to manage the national parks is concerned, the remedy, we think, is not in the courts if there is no abuse of the discretion granted.

Reversed and remanded with instructions to dissolve the injunction and dismiss the action.

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of state law, for purposes of scientific research. Although appellants seek to justify such action on grounds that it is necessary to protect park lands, this occurrence is but one in a series of recent endeavors by the Department of the Interior to enter the field of game management, a role which has been historically and competently fulfilled by the States. Therein resides the interest of the Association in this proceeding. Interior Department administrators increasingly claim that, on federally owned lands, the federal government has the right to manage and control wildlife, including the right to take and dispose of such game as the Department deems appropriate, and the State may not interfere. The Association takes strong issue with this position and believes that it should not be allowed to pass without challenge."

In the amicus curiae brief filed by the State of Michigan it is said:

"If the Federal Government succeeds in this case in achieving its ultimate aim, as indicated in its brief, of securing complete control over fish and wildlife located on its lands on the theory of its ownership of such lands, it is the fear of the states that the next logical step will be to use this new power for the purpose of regulating hunting and fishing on these lands and charging a license for such a privilege."